

No. 20-72793

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *et al.*,
Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,
Petitioners–Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS
CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS;
PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN;
AMERICAN MILITARY PARTNER ASSOCIATION,

Real-Parties-in-Interest–Plaintiffs,

STATE OF WASHINGTON,

Real-Party-in-Interest–Intervenor-Plaintiff.

**REPLY IN SUPPORT OF MOTION FOR A STAY PENDING CONSIDERATION
OF THE GOVERNMENT’S PETITIONS FOR A WRIT OF MANDAMUS**

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The Court has before it the government's February 2020 mandamus petition and the parties' supplemental filings requested by the Court in No. 20-70365, along with the government's recent September 2020 petition and stay motion. The Court has stayed the discovery at issue in the first petition, and argument is set for tomorrow, October 14.

The government respectfully submits this reply in support of our request for a stay of discovery pending this Court's consideration of the government's petitions. Plaintiffs in large part reprise the arguments set out in their answer to our September 2020 petition, which are fully addressed in our reply filed on October 12. We file this stay reply to specifically address plaintiffs' assertions that, apart from the merits of our petition, there is no need for the Court to enter a stay.

First, plaintiffs contend that they have obviated the need for this Court to stay the district court's deposition orders because—after being alerted to the government's intention to request relief in this Court—they would stipulate to an order requiring thirty days' notice before rescheduling a deposition. *See* Opp. 1. Plaintiffs' contention underscores that they have never demonstrated the required extraordinary circumstances that would justify the depositions. Indeed, plaintiffs' current protestations that they may not need the depositions make clear that even they understand that no such circumstances exist. Plaintiffs have not, however, renounced their intention to take the depositions authorized by the district court. Absent a stay, plaintiffs may proceed to do so at any time pursuant to that authorization, which

would create a need for subsequent emergency filings in this Court. Plaintiffs' gambit of demanding depositions on definite dates then abandoning them is solely designed to forestall this Court's review, and it does not alter the need for a stay.

Second, the need to stay the remaining discovery pending this Court's review has only grown clearer since the government initially filed its stay motion.

Plaintiffs and the district court have made it clear that absent a stay, intrusive discovery will proceed unchecked for the sole purpose of allowing plaintiffs to search for elusive evidence that the Panel process was a sham. The court's response to the government's petition states that its next disclosure order concerns deliberative documents from the post-Panel period that are at issue in the government's February 2020 petition and the subject of this Court's prior stay order. *See* D. Ct. Resp. 9. Those documents include "iterative drafts" of the Department's Report presenting the rationales for the Mattis policy, as well as other sensitive documents such as Secretary Mattis's handwritten notes. *Id.*

The district court has declared that its next orders will come "quickly," *id.* at 10, and its recent orders make clear that—absent a stay—this will indeed be the case. The court has repeatedly required disclosure on timeframes of ten days or less. *See, e.g.,* Doc. 614 (recent September 25 order requiring disclosure by October 5).

Moreover, the ongoing discovery process has proved to be a means by which the district court can itself publish the privileged material at issue. Although the government submitted privileged documents *in camera* pursuant to a protective order,

the court has revealed certain sealed materials by including substantial block quotes in orders on the public docket. *See* Doc. 614, at 7-8. When the government asked the court to refrain from this practice, the court declared that its disclosures are not “problematic.” Doc. 620, at 28:23. Unless this Court issues a stay, the district court may well issue more such orders disclosing deliberative material in the near future, including potentially orders encompassing the very documents before this Court.

In sum, the need for immediate relief is clear, and we ask that the Court stay discovery pending its disposition of the government’s petitions.

Respectfully submitted,

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OCTOBER 2020

CERTIFICATE OF COMPLIANCE

hereby certify that this reply complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it totals 629 words. I further certify that this reply complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Dennis Fan

DENNIS FAN

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via the CM/ECF system.

s/ Dennis Fan

DENNIS FAN